BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRED LEONARD, Petitioner, vs. UNION COUNTY, Respondent.	LUBA No. 91-202
BEVERLY LOUSIGNONT and KENNETH BAKER, Petitioners, vs. UNION COUNTY, Respondent.	FINAL OPINION AND ORDER LUBA No. 92-096

Appeal from Union County.

Edward J. Sullivan and Daniel Kearns, Portland, represented petitioners.

Paul R. Hribernick, Portland, and Russell B. West, La Grande, represented respondent.

HOLSTUN, Referee; KELLINGTON, Referee, participated in the decision.

DISMISSED 12/30/92

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Holstun.

MOTION TO CONSOLIDATE

Under OAR 661-10-055, LUBA

> "* * * may consolidate two or more proceedings, provided the proceedings seek review of the same or closely related land use decision(s)."

LUBA No. 91-202 and LUBA No. 92-096 seek review of the same county ordinance, and they are consolidated for our review.[1]

NATURE OF THE DECISION

The local government decision challenged in this appeal is an ordinance adopting an Alluvial Aggregate Resources Study (Aggregate Study) as part of the Union County Comprehensive Plan (Plan).[2] Additionally, the ordinance adopts amendments to the Plan and the Union County Zoning, Partition and Subdivision Ordinance (ZPSO) and changes the Plan and zoning map designations for several properties.

FACTS

Beginning in December 1987, the Alluvial Resources Advisory Committee, a five member citizen advisory committee appointed by the Union County Board of Commissioners, began meeting to consider and make recommendations to the planning commission concerning planning for alluvial aggregate

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[1]The county filed a record in LUBA No. 91-202. A separate record was not filed in LUBA No. 92-096.

[2]The Aggregate Study appears at Record 39 through 159.

resources.[3] Petitioner Leonard was a member of the Alluvial Resources Advisory Committee. The Alluvial Resources Advisory Committee made recommendations to the planning commission and board of commissioners. The planning commission and board of commissioners held a joint public hearing on the advisory committee's recommendations on June 10, 1991. Thereafter the board of commissioners held a second public hearing on July 25, 1991 and adopted the challenged ordinance on that date. The only notices given of the public hearings that preceded adoption of the challenged ordinance were published in a local newspaper. No individual written notice of those hearings was provided to owners of land adjoining the affected properties.[4] Few people attended the public hearings, and none of the petitioners in this consolidated appeal appeared during those public hearings.

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[3]According to an uncontested affidavit attached to respondent's response to petitioner Leonard's record objections filed earlier in this matter:

> "In December of 1987, * * * the Alluvial Resources Advisory Committee began meeting to make a recommendation to the Union County Planning Commission. This advisory committee consisted of special interest groups interested in alluvial aggregate resources. This advisory committee had no legislative power and only met to make recommendations. The meetings continued [through] October 3, 1989 whereupon the meetings and committee terminated. * * *"

[4]Respondent claims written notices of both the hearings and the challenged decision were sent to petitioner Leonard and other members of the advisory committee. Petitioner Leonard challenges the adequacy of the notices and contends he never received the notices, in any event.

Following the board of commissioners' July 25, 1991 decision adopting the challenged ordinance, petitioner Leonard filed his notice of intent to appeal in LUBA No. 91-202, 104 days later, on November 6, 1991. Petitioners Lousignont and Baker filed their notice of intent to appeal in LUBA No. 92-096, 279 days later, on April 29, 1992.

DECISION

Respondent moves to dismiss these appeals, alleging that petitioners in both appeals failed to appear during the local proceedings that led to adoption of the challenged ordinance, as required by ORS 197.830(2)(b). Respondent also alleges that the appeals were not filed within the 21 day time limit for filing a notice of intent to appeal with the Land Use Board of Appeals. ORS 197.830(3) and (8); OAR 661-10-015. We agree with respondent that the appeals were not timely filed; and, for that reason, we grant the motions to dismiss.

A. Statutory Requirements for Notice and Hearing

Petitioners offer a variety of arguments, based on alleged failures by the county to provide written notices of either the public hearings or the decision in this matter, to explain the delay in filing their notices of intent to appeal. Some of those arguments assume the challenged decision is quasi-judicial and, therefore, subject to the notice and hearing requirements of ORS 197.763, or a "permit" subject to the notice and hearing requirements of

ORS 215.402 to 215.431.[5]

We first reject petitioners' suggestion that the challenged decision is subject to review for compliance with the statutory requirements governing approval of "permits." As previously noted, the decision challenged in this appeal adopts new and amended Plan and ZPSO provisions and amends the Plan and zoning map designations for certain properties. As we explained in Constant v. City of Lake Oswego, 5 Or LUBA 311, 317 (1982), zone changes are not "permits" as that term is used in the parallel statutory provisions governing city permit decisions. See also Reeder v. Clackamas County, 20 Or LUBA 238, 243 n7 (1990); Torgeson v. City of Canby, 19 Or LUBA 623, 627 n2 (1990); Hewitt v. City of Brookings, 7 Or LUBA 130, 131 (1983). Neither does the adoption of new or amended plan and zoning text or plan map provisions constitute approval of a "permit," as that term is defined in ORS 215.402(4). See n 5, supra.

We next consider whether the challenged decision is, as petitioners contend, is a quasi-judicial land use decision subject to the notice and hearing requirements of ORS 197.763.

The local proceedings that led to adoption of the

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[5]ORS 197.763 establishes procedural requirements, including notice and hearing requirements, for all quasi-judicial land use decisions. ORS 215.402 to 215.431 establish procedural requirements, including notice and hearing requirements, for county "permit" decisions. The term "permit" is defined by ORS 215.402(4) as "discretionary approval of a proposed development of land * * *."

challenged decision included a lengthy public process, during which alluvial resources in a significant area of the county were examined. The challenged decision adopts a number of measures. First, it adopts the Aggregate Study. Second, it adopts amendments to the text of the Plan and ZPSO. Third, it adopts new Plan and zoning designations for six separate properties, comprising a total of 227 acres. Those Plan and zoning designation changes are as follows:

1. The Plan and zoning map designations for an 18 acre area west of Island City (the R.D. Mac, Inc. property) are changed to Industrial and Surface Mining, respectively.[6]

2. The Plan map designation for a 12.8 acre area is changed to Rural Residential. Part of the 12.8 acres is rezoned Farm Residential and part is rezoned Rural Residential.

3. The Plan map designation for a 51.75 acre area is changed to Rural Residential. Part of the 51.75 acres is rezoned Farm Residential and part is rezoned Rural Residential.

4. The Plan map and zoning map designations for an 80 acre area are changed to Exclusive Agriculture and Exclusive Farm Use, respectively.

5. The Plan and zoning map designations for a 35 acre area are changed to Industrial and Surface Mining, respectively.

6. The Plan designation for a 30 acre area is

[6]The existing Statewide Planning Goal 2 (Land Use Planning) exception for these 18 acres was also amended. Prior to adoption of the disputed decision, six of the 18 acres were planned Rural Residential and zoned Farm Residential (R-3).

changed to Surface Mining Reserve.

7. Existing ZPSO provisions governing the Surface Mining Zone are amended.

Finally, the challenged decision provides recommendations to the planning commission with regard to site plan review of the R.D. Mac, Inc. property described in item No. 1 above.[7]

While it is certainly possible to describe the challenged decision as a collection of individual decisions, some of which if viewed in isolation likely would be characterized as quasi-judicial, we believe the challenged decision is correctly viewed as a whole. For the reasons explained below, when the challenged decision is viewed as a whole, we conclude it is correctly characterized as legislative rather than quasi-judicial.

In Strawberry Hill 4-Wheelers v. Benton Co. Bd. of Comm., 287 Or 591, 602-03, 601 P2d 769 (1979), the Oregon Supreme Court identified three factors to be considered in determining whether a local government decision is quasi-judicial. Those factors may be summarized as follows:

1. Is "the process bound to result in a decision?"

[7]On February 20, 1992, the county granted site plan review approval for the R.D. Mac., Inc. property, and that decision was appealed to this Board. That appeal was dismissed pursuant to an agreement of the parties. Lousignont v. Union County, ___ Or LUBA ___ (LUBA No. 92-066, June 19, 1992). The parties in this appeal were also parties in the local proceedings that led to the decision challenged in LUBA No. 92-066, and the significance of the parties' participation in this local proceeding is discussed further later in this opinion.

2. Is "the decision bound to apply preexisting criteria to concrete facts?"

3. Is the action "directed at a closely circumscribed factual situation or a relatively small number of persons?"

The second factor is present, because preexisting criteria apply, as is invariably the case with land use decisions whether they be legislative or quasi-judicial. However, the decision challenged in this appeal was not the result of a local proceeding that was "bound to result in a decision." Neither was the decision "directed at a closely circumscribed factual situation or a relatively small number of persons." See Davenport v. City of Tigard, ___ Or LUBA ___ (LUBA Nos. 91-133 and 91-137, January 28, 1992), slip op 4-5.

No single Strawberry Hill criterion is determinative. Estate of Paul Gold v. City of Portland, 87 Or App 45, 740 P2d 812, rev den 304 Or 405 (1987). Here, however, only one of the three criteria is met; and we conclude the challenged decision falls within the somewhat nebulous category of "legislative" land use decisions. Therefore, the notice and hearing requirements of ORS 197.763 applicable to "quasi-judicial" land use proceedings do not apply.

B. ZPSO Requirements for Notice and Hearing

ZPSO Article 23.00 is entitled "Land Use Regulation and Land Use Plan Amendments," and the requirements of ZPSO Article 23.00 are cited in the challenged decision as

governing the challenged decision. ZPSO 23.03(3) provides that "[n]otice of a public hearing before the Planning Commission shall be given according to provisions in [ZPSO] 23.04." ZPSO 23.04 provides as follows:

> "All notices shall contain the time, place and a brief description of the application and shall be circulated in the following manner:
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> "1. Separate notice of the Planning Commission and County Court hearings shall be published in a newspaper of general circulation in the County at least 10-days prior to the prospective hearings.
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> "2. Individual notice shall be mailed to the recorded owners within 300-feet of the property for which a Plan map or Zoning map change has been requested. Failure of the property owner to receive the notice described shall not invalidate any amendment.
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> "3. A proposal to amend the Land Use Plan or land use regulation or to adopt a new land use regulation shall be submitted to the Director of the Oregon DLCD at least 45-days before the final County Court hearing on adoption. The proposal submitted shall contain 4-copies of the text and any supplemental information the county believes is necessary to inform the Director of DLCD as to the effect of the proposal and shall indicate the date of the final hearing on adoption by the County Court.
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> "4. Planning decisions will be coordinated with other local, State and Federal agencies that may have an effect upon, or be affected by the decision."

Respondent contends, and petitioners do not dispute, that the newspaper notice required by ZPSO 23.04(1) was given prior to adoption of the challenged decision.

Respondent further contends that the notice required by ZPSO 23.04(2) was not required in this proceeding, because the challenged decision is legislative, and ZPSO 23.04(2) applies only to quasi-judicial decisions. Petitioners dispute this latter contention.

We see nothing in the above quoted language limiting the written notice of hearing requirement specified in ZPSO 23.04(2) to quasi-judicial proceedings. No party has cited, and we are unable to locate, any language in ZPSO Article 23.00 which distinguishes between legislative and quasi-judicial plan and land use regulation amendments. Without some basis in the language of ZPSO Article 23 for excluding legislative plan and land use regulation amendments from the notice requirements of ZPSO 23.04(2), we reject respondent's arguments that ZPSO 23.04(2) does so.

Although there is some confusion on the point, we assume for purposes of this opinion that all three petitioners were entitled to written notice of the hearing before the planning commission and board of county commissioners in this matter under ZPSO 23.04(2). With the exception of petitioner Leonard, respondent does not contend that petitioners were provided written notice of the public hearing on the challenged decision.[8]

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[8]Respondent contends that a letter was sent to petitioner Leonard as a member of the Alluvial Resources Advisory Committee and that the letter was sufficient to satisfy the requirement of ZPSO 23.04(2). Respondent also contends that notice of the decision challenged in this proceeding was sent

C. Failure to Provide Individual Notice of Hearing as required by ZPSO 23.04(2)

Petitioners contend that had they been provided the individual notice of hearing required by ZPSO 23.04(2), they would have appeared during the public hearings held before the planning commission and board of county commissioners and opposed the decision. Had petitioners done so, and requested notice of the decision in writing, they would have been entitled to written notice of the challenged decision under ZPSO 23.03(8)(C). Petitioners reason that the county's failure to provide them with individual written notice of the decision should have the legal effect of suspending the 21 day deadline for filing with this Board a notice of intent to appeal the challenged decision, until petitioners are provided such notice.

Petitioners' arguments rely upon, and attempt to extend, appellate court decisions concerning the effects on statutory standing requirements and statutory appeal deadlines that may result from local government failures to provide statutorily required notices of hearing and decision in permit and postacknowledgment plan and land use regulation amendment proceedings. Flowers v. Klamath County, 98 Or App 384, 780 P2d 227 (1989) (failure to

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to petitioner Leonard. Petitioner Leonard disputes those contentions. In view of our disposition of this matter, we need not resolve these disputes. We assume, for purposes of this opinion, that the county did not provide petitioners with the written notice of hearing to which they were entitled under ZPSO 23.04(2).

provide notice of hearing in permit proceeding); League of Women Voters v. Coos County, 82 Or App 673, 729 P2d 588 (1986) (failure to provide notice of permit decision); Ludwick v. Yamhill County, 72 Or App 224, 696 P2d 536, rev den 299 Or 443 (1985) (failure to provide notice of decision amending acknowledged comprehensive plan and zoning ordinance). Petitioners argue that persons who (1) are entitled to written notice of a public hearing, and (2) are not given the required notice of hearing (and for that reason fail to appear and thereby become parties entitled to written notice of the decision), nevertheless are thereafter entitled to written notice of the decision. Petitioners go further and, citing League of Women Voters v. Coos County, supra, contend that such persons are absolutely entitled to such written notice of the decision and, if such written notice of the decision is not given, they need not appeal the decision to LUBA even though they may have actual notice of the decision.

We first note that we have already determined petitioners' right to receive notice of hearing in this matter is provided by local law, ZPSO 23.04(2) quoted supra, rather than by statute. Therefore, the cases cited above are not direct authority for petitioners' contention that the running of the 21 day appeal period for filing their notice of intent to appeal with this Board does not begin until the county, in fact, gives each of them individual

written notice of the challenged decision. Furthermore, regardless of whether the right to receive individual notice of hearing is based on statute or local law, we do not agree with petitioners that the county's failure to provide individual written notice to petitioners of the hearings held in this matter is sufficient, by itself, to entitle petitioners to be given individual written notice of the decision or to toll the 21 day deadline for filing a notice of intent to appeal with this Board until individual written notice of the decision is given to petitioners. As we explained in Citizens Concerned v. City of Sherwood, 21 Or LUBA 515 (1991), the absolute right under League of Women Voters v. Coos County to be given individual written notice of the decision before the 21 day appeal period begins to run does not apply in such circumstances. Rather, in such circumstances, the 21 day appeal period begins to run when petitioners obtain actual knowledge of the decision, regardless of whether the county provided petitioners individual written notice of the decision. We explained our reasoning in Citizens Concerned as follows:

> "The difficulty with petitioners' contention [that they are absolutely entitled to individual written notice of the local decision] is that unlike the situation presented in League of Women Voters, the city did not give notice of hearing or conduct a hearing in this matter. Therefore, the petitioners could not and did not become 'parties' entitled to written notice of the decision under ORS 227.173(3). In League of Women Voters, the petitioners appeared, took a position during the local proceeding and were therefore entitled by

statute to receive written notice. In such circumstances the Court of Appeals held the period for appeal to LUBA does not begin to run until such persons, who have become 'parties' by virtue of their participation in the local hearing, receive the written notice to which they are statutorily entitled.

"Admittedly, had the city given the notice of hearing required by ORS 227.175(5) and held a hearing, one or more of the petitioners might have learned of the hearing, might have appeared at the hearing and presented testimony and, thereby, would have become a 'party' entitled to written notice of the decision under ORS 227.173(3). It is essentially the possibility that an interested person might have taken such steps that led the Court of Appeals to conclude a local government's failure to observe statutory notice of hearing and hearing requirements obviates the statutory standing requirements for an 'appearance' and 'aggrievement' under ORS 197.830(3). Flowers, supra.

"It is possible to apply the reasoning in Flowers to extend the absolute right to receive written notice of the decision, which 'parties' have under League of Women Voters, to also include persons who might have become 'parties' if notice of hearing and a hearing had been provided. However, we do not believe it is appropriate to do so.

"In League of Women Voters, the persons who qualified as 'parties' were an identifiable class, i.e. those who participated in the proceedings and thereby became parties. As the Court of Appeals explained, it is a relatively simple matter for the local government to identify such parties and provide them with the required notice. The situation is far different where the local government has proceeded on the erroneous assumption that notice of hearing and a hearing are not required by statute. In such a situation, there is no clearly identifiable class of parties entitled to notice of the decision. The identification of 'parties' statutorily entitled to written notice of the decision under ORS

> 227.175(10) in such a circumstance is sufficiently problematic that we do not believe the Court of Appeals would extend its holding in League of Women Voters to apply in such circumstances to persons who might have become parties." Citizens Concerned v. City of Sherwood, supra, 21 Or LUBA at 529-30.

Our decision in Citizens Concerned dealt with a city's failure to provide notice of hearing in a permit proceeding, as required by statute. However, for the reasons explained below in the next section of this opinion, we conclude the time for filing an appeal with this Board is tolled in a similar manner under ORS 197.830(3), where a local government fails to provide the written notice of local hearing required under a local code provision.[9] As explained below, the 21 day appeal period set out in ORS 197.830(3) begins either at the time of "actual notice of the decision," if the person was entitled to notice of the decision, or "the date a person knew or should have known of the decision," if the person was not entitled to written notice of the decision.

D. ORS 197.830(3)

ORS 197.830(3) provides as follows:

> "If a local government makes a land use decision without providing a hearing or the local government makes a land use decision which is different from the proposal described in the notice to such a degree that the notice of the

[9]The statutory provisions codified at ORS 197.830(3) did not apply to the proceedings at issue in Citizens Concerned.

> proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to [LUBA] under this section:
>
> "(a) Within 21 days of actual notice where notice is required, or
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required." (Emphasis added.)

As an initial point, we construe ORS 197.830(3) to apply where a local government is required to provide a hearing under state or local law, but fails to do so. We determine above that in the present case ZPSO 23.04(2) required that the county provide a hearing in this matter.

The more difficult question is what the legislature meant in ORS 197.830(3) by the words "without providing a hearing." That language, if applied literally, would limit the applicability ORS 197.830(3) to circumstances where no hearing was held. However, the words "without providing a hearing" can be construed also to encompass circumstances where, although a hearing may have been held, one or more persons effectively were not provided a hearing due to the local government's failure to provide them the notice of the hearing to which they were entitled. We adopt the latter construction, because a person is just as effectively denied his or her right to a hearing in both circumstances. Cf. Flowers v. Klamath County, supra, 98 Or App at 388 (local government may not rely on its own "failure to provide notice and a hearing to defeat petitioners' ability to

achieve standing to challenge the failure to provide them").

In summary, a local government fails to "[provide] a hearing," within the meaning ORS 197.830(3) if it (1) fails to provide a hearing at all; or (2) fails to give a person the individual notice of hearing he or she was entitled to receive under state or local law, thus denying that person the ability to learn about and attend the hearing.[10] Therefore, the time limits specified in ORS 197.830(3)(a) and (b), within which a person adversely affected by the decision may file a notice of intent to appeal to LUBA, apply in the following three circumstances:

> (1) The local government was required to hold a hearing, and did not do so.
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> (2) The local government held a hearing, but failed to give one or more persons the notice of hearing they were entitled to receive under applicable provisions of state or local law.
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> (3) The local government held a hearing and gave the required notice of that hearing, but the action taken in the decision is significantly different from the proposal described in the hearing notice.

The second of the above circumstances applies in this case. Under ORS 197.830(3), "a person adversely affected by

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[10]A person who received the legally required notice, and did not attend the hearing, or who failed to receive the legally required notice, but nevertheless learned about and attended the hearing, has been "[provided] a hearing" within the meaning of ORS 197.830(3) and would not be entitled to file a notice of intent to appeal within the time limits provided in ORS 197.830(3).

the decision may appeal the decision to [LUBA]:

> "(a) Within 21 days of actual notice where notice is required, or
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

For purposes of this opinion, we assume petitioners are adversely affected by the decision.[11] The above quoted portion of ORS 197.830(3) does not make it clear whether the word "notice" refers to notice of the decision or to notice of hearing. However, construing the statute as a whole, and viewing its use of the word "notice" in context, it is reasonably clear it refers to notice of the decision.[12] Therefore under ORS 197.830(3)(a), an appeal to LUBA must be filed "[w]ithin 21 days of actual notice [of the decision], where notice [of the decision] is required." Under ORS 197.830(3)(b), an appeal to LUBA must be filed "[w]ithin

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[11]Under OAR 661-10-030(3)(a), the petition for review must include a statement of "the facts that establish petitioner's standing[.]" Therefore, petitioners relying on the timelines established by ORS 197.830(3) for filing a notice of intent to appeal with this Board must allege facts sufficient to establish that they are "adversely affected" by the challenged decision.

[12]The 21 day appeal period in ORS 197.830(3)(b) is measured from "the date a person knew or should have known of the decision * * *." The 21 day appeal period measured from "actual notice" in ORS 197.830(3)(a) could only logically refer to notice of the decision. Although the phrases "where notice is required" in ORS 197.830(3)(a) and "where no notice is required" in ORS 197.830(3)(b) arguably could refer either notice of hearing or notice of the decision, we conclude the latter meaning was intended. If we are correct that the initial use of the word "notice" in 197.830(3)(a) means notice of the decision, there is no reason to suspect that a different meaning was intended where the word notice is used elsewhere in ORS 197.830(3)(a) and (b).

21 days of the date a person knew or should have known of the decision where no notice [of the decision] is required."

Although petitioners were entitled to notice of the hearing held by the county in this matter under ZPSO 23.04(2), neither that ZPSO provision, nor any other ZPSO or statutory provision of which we are aware required that the county give petitioners notice of the challenged decision. Therefore, under ORS 197.830(3)(b), petitioners' notices of intent to appeal in this matter are timely only if they were filed within 21 days after petitioners "knew or should have known" of the challenged ordinance.

E. Petitioners' Knowledge of the Challenged Decision

Both parties have attached, and ask that we consider, written material that is not included in the record submitted by respondent in this matter. Therefore, we first consider whether this Board is limited to the record, or whether we may consider evidence outside the record in determining whether petitioners' notices of intent to appeal were timely filed.[13]

Our review in this appeal normally would be limited to

[13]With the agreement of the parties, we earlier dismissed an appeal concerning site review approval for one of the sites affected by the decision challenged in this appeal. Lousignont v. Union County, (LUBA No. 92-066, June 19, 1992). See n 7 and related text, supra. While no party has moved for an evidentiary hearing or requested that we consider the entire record in LUBA No. 92-066 in determining when petitioners knew or should have known of the challenged decision, the proceedings leading to the decision challenged in LUBA No. 92-066 occurred shortly after the challenged decision was made and are clearly related.

the record submitted in this matter and would not include the record in LUBA No. 92-066, absent an agreement by the parties to the contrary. ORS 197.830(13)(a). However, on at least one other occasion, we have considered materials not included in the record in determining whether we have jurisdiction. Hemstreet v. Seaside Improvement Comm., 16 Or LUBA 630, 631-33 (1988). In Hemstreet, while no party moved for an evidentiary hearing, all parties attached written material not included in the record and requested that we consider such material in determining our jurisdiction. As in Hemstreet, we consider the pages of the local record in LUBA No. 92-066 submitted by the parties in this case, as well as the additional pages from that record cited in this opinion, in determining whether petitioners knew or should have known of the decision challenged in this proceeding as a result of their participation in the local proceedings that led to the decision challenged in LUBA No. 92-066.

The timely filing of a notice of intent to appeal is required for this Board to have jurisdiction, and petitioners have the burden of establishing that LUBA has jurisdiction. Sparrows v. Clackamas County, ___ Or LUBA ___ (LUBA No. 92-107, December 7, 1992), slip op 11; Citizens Concerned, supra, 21 Or LUBA at 527; Flowers v. Klamath County, 17 Or LUBA 1078, 1103 (1989). Where a petitioner seeks to file a notice of intent to appeal with this Board under ORS 197.830(3)(b) more than 21 days after the appealed

decision became final, it is petitioner's burden to demonstrate that the notice of intent to appeal is timely filed under ORS 197.830(3)(b), i.e. within 21 days after the petitioner knew or should have known of the challenged decision.

All of the petitioners were participants in the local proceedings that led to the decision challenged in LUBA No. 92-066. All petitioners were present and spoke at a September 23, 1991 planning commission meeting during those proceedings. Record (LUBA No. 92-066) 170-73. A planning department staff report was submitted and discussed during that meeting. Record (LUBA No. 92-066) 170, 175-82. That staff report refers to the Alluvial Resources Advisory Committee deliberations and the board of county commissioners' decision challenged in this appeal. Record (LUBA No. 92-066) 178.

By virtue of his participation in the proceedings leading to the decision challenged in LUBA No. 92-066 and as a member of the Alluvial Resources Advisory Committee and his presumed familiarity with the nature of the recommendations of the Alluvial Resources Advisory Committee to the board of county commissioners, petitioner Leonard knew or should have known of the challenged decision as early as September 23, 1991.[14] Petitioner Leonard has not

[14]Petitioner Leonard concedes that he learned of the adoption of the challenged ordinance on September 23, 1991. Petition for Review 2.

satisfied his burden to show that his notice of intent to appeal in LUBA No. 91-202 was filed within 21 days after he knew or should have known of the challenged decision.[15]

It is even clearer that the notice of intent to appeal filed in LUBA No. 92-096, by petitioners Lousignont and Baker, was filed more than 21 days after petitioners Lousignont and Baker knew or should have known of the challenged decision. Petitioners Lousignont and Baker were also present at the September 23, 1991 planning commission meeting and opposed the request for site plan approval. The record in LUBA No. 92-066 indicates that on October 28, 1991, opponents submitted a memorandum opposing the proposed site plan approval. Record (LUBA No. 92-066) 159. That memorandum explicitly refers to the ordinance challenged in this appeal and states that the ordinance will be challenged at LUBA.[16] Petitioners Lousignont and Baker did not file their notice of intent to appeal in LUBA No. 92-096 until April 29, 1992.[17]

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[15]As noted earlier, petitioner Leonard filed his notice of intent to appeal on November 6, 1991.

[16]The record indicates the opponents' memorandum was submitted by petitioner Lousignont. Record (LUBA No. 92-066) unnumbered table of contents.

[17]Petitioner Lousignont concedes she was aware of the challenged ordinance by September 23, 1991. Petitioner's Opposition to Respondent's Motion to Dismiss, Exhibit 2, p. 3. While petitioner Baker apparently does not concede that he was aware of the challenged ordinance by September 23, 1991, for the reasons explained in the text, we conclude that he was.

For the reasons explained above, we conclude petitioners have failed to demonstrate that the notices of intent to appeal in LUBA Nos. 91-202 and 92-096 were timely filed.

F. Postacknowledgment Plan Amendment Procedures

The decision challenged in this appeal is a postacknowledgment amendment of the county Plan and ZPSO. Under ORS 197.615(1), the text of the amendment as well as the supporting findings must be transmitted to the Department of Land Conservation and Development (DLCD). Petitioners contend the county did not send a complete copy of the challenged ordinance and findings to DLCD, as required by ORS 197.615(1), until October 17, 1991 and that petitioner Leonard's notice of intent to appeal is timely because it was filed within 21 days of that date.[18]

The fundamental flaw in petitioners' argument is that none of the petitioners were included on DLCD's list of persons entitled to receive notice of the county's decision pursuant to ORS 197.615(3) at the time the decision, or some

[18]The county's notice to DLCD that it adopted the ordinance challenged in this appeal was received by DLCD on August 2, 1991. Petitioners contend that notice included copies of the ordinance and the Aggregate Study but did not include a copy of the supporting findings. On October 15, 1991 petitioners' attorney requested that DLCD provide him a copy of the notice of adoption that DLCD received from the county on August 2, 1991. The copy of that submittal provided by DLCD to petitioners' attorney did not include the findings supporting the challenged ordinance. Thereafter, the county provided DLCD a copy of the supporting findings, which DLCD received on October 17, 1991 and provided to petitioners' attorney. However, respondent disputes petitioners' contention that the findings document was not included with the August 2, 1991 submittal to DLCD.

part of the decision, initially was received by DLCD in August 2, 1991.[19] Therefore, even if the notice of decision submitted to DLCD was defective in the way petitioners allege, it could not have prejudiced their substantial rights in any way, because they would not have received notice of the challenged action from DLCD in any event. The subsequent inquiries from DLCD and subsequent submittal by the county provide no excuse for petitioners' failure to file their notices of intent to appeal with this Board within 21 days after they knew or should have known of the challenged decision.[20] Sparrows v. Clackamas County, supra, slip op at 9; Kellogg Lake Friends v. City of Milwaukie, 16 Or LUBA 755, 759-60 (1988).

This appeal is dismissed.

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[19]ORS 197.615(3) provides, in part, as follows:

> "Not later than five working days after receipt of an amendment to an acknowledged comprehensive plan or land use regulation or a new land use regulation * * *, the director shall notify by mail or other submission any persons who have requested notification. * * *"

The notice provided by the director under ORS 197.615(3) must include notice of requirements for appeal and list locations where the new or amended plan or land use regulation provision may be reviewed.

[20]Petitioners also argue that because the challenged decision amends a statewide planning goal exception contained in the Plan, the county was obligated to give the notice of public hearing on proposed goal exceptions required by ORS 197.732(5). However, ORS 197.732(5) does not require that individual written notice be given. While petitioners appear to be correct that the published notice of hearing actually given by the county fails to comply with the substantive requirements of ORS 197.732(5), that failure has no effect on the petitioners' obligation under ORS 197.830(3)(b) to file a notice of intent to appeal with LUBA within 21 days after they "knew or should have known" of the challenged decision.